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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 9

RALPH D. ABERNATHY, CLYDE CARTER, WILLIAM S. COFFIN, JR., JOSEPH CHARLES JONES, BERNARD S. LEE, JOHN DAVID MAGUIRE, GAYLORD B. NOYCE, FRED L. SHUTTLESWORTH, GEORGE SMITH, DAVID E. SWIFT and WYATT TEE WALKER,

Petitioners,

—v.—

STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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IN THE

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No. .....

RALPH D. ABERNATHY, CLYDE CARTER, WILLIAM S. COFFIN, JR., JOSEPH CHARLES JONES, BERNARD S. LEE, JOHN DAVID MAGUIRE, GAYLORD B. NOYCE, FRED L. SHUTTLESWORTH, GEORGE SMITH, DAVID E. SWIFT and WYATT TEE WALKER,

Petitioners,

—v.—

STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Alabama in the cases of *Ralph D. Abernathy* v. *State of Alabama; Clyde Carter* v. *State of Alabama; William S. Coffin, Jr.* v. *State of Alabama; Joseph Charles Jones* v. *State of Alabama; Bernard S. Lee* v. *State of Alabama; John David Maguire* v. *State of Alabama; Gaylord B. Noyce* v. *State of Alabama; Fred L. Shuttlesworth* v. *State of Alabama; George Smith* v. *State of Alabama; David E. Swift* v. *State of Alabama* and *Wyatt Tee Walker* v. *State of Alabama,* entered on October 23, 1962. The Supreme Court of Alabama denied certiorari on July 25, 1963.

Citations to Opinions Below

The opinion of the Court of Appeals of Alabama in *Abernathy* v. *Alabama* (R. A. 476)[1] is reported at 155 So. 2d 586 and is set forth in the appendix attached hereto, *infra*, p. 1a. The Court of Appeals rendered no opinion in the other cases but affirmed the convictions on the authority of the *Abernathy* case (R. Ca. 34; R. Co. 36; R. J. 35; R. L. 34; R. M. 35; R. N. 35; R. Sh. 34; R. Sm. 34; R. Sw. 35; R. W. 34).

Jurisdiction

The judgment of the Court of Appeals of Alabama in each of these cases was entered on October 23, 1962 (R. A. 475; R. Ca. 34; R. Co. 36; R. J. 35; R. L. 34; R. M. 35; R. N. 35; R. Sh. 34; R. Sm. 34; R. Sw. 35; R. W. 34). Rehearing was denied on November 20, 1962 (R. A. 489; R. Ca. 35; R. Co. 37; R. J. 36; R. L. 35; R. M. 36; R. N. 36; R. Sh. 35; R. Sm. 35; R. Sw. 36; R. W. 35). The Supreme Court of Alabama denied certiorari on July 25, 1963 (R. A. 496).[2]

The jurisdiction of this Court in each of these cases is invoked pursuant to Title 28, United States Code, Section 1257(3), petitioners having asserted below and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

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1 The record in the *Abernathy* case is cited herein as "R. A." followed by the page number. The *Abernathy* record contains the trial transcript for each case. The other records are cited as follows: (1) Carter—"R. Ca."; (2) Coffin—"R. Co."; (3) Jones—"R. J."; (4) Lee—"R. L."; (5) Maguire—"R. M."; (6) Noyce—"R. N."; (7) Shuttlesworth—"R. Sh."; (8) Smith—"R. Sm."; (9) Swift—"R. Sw."; and (10) Walker—"R. W."

2 In all cases except *Abernathy*, the order of the Supreme Court of Alabama denying certiorari was not included in the certified records as bound. However, the order in the *Abernathy* record, p. 496, contains the captions of all eleven cases, and in

Questions Presented

In May of 1961, when Montgomery, Alabama, was under the control of the Alabama National Guard, petitioners, seven Negroes and four whites, were escorted by Guardsmen to an interstate bus terminal, from which seven of petitioners were planning to take a bus to Mississippi. While awaiting the departure of the bus, petitioners, in the presence of their Guard escort—an escort which included the senior guard officers controlling the city—crossed the terminal waiting room and sat down at the terminal lunch counter to get a snack. The Guard officers did not tell any of petitioners not to sit down at the counter; nor did they tell any of petitioners not to do so prior to escorting petitioners to the terminal. After petitioners were seated at the lunch counter, the Sheriff of Montgomery County, acting on a signal from a ranking Guard officer, arrested petitioners for breach of the peace and unlawful assembly.

Petitioners promptly sought a federal court injunction to restrain the county solicitor from prosecuting them on these charges. After taking extensive testimony, District Judge Johnson denied the injunction on the ground that 28 U. S. C. §2283 prevented him from restraining a pending state criminal prosecution; but in announcing his decision, Judge Johnson said that the arrest of petitioners was designed to perpetuate racial segregation.

At petitioners' ensuing state court trial, ranking Guard officers testified that, in view of the presence across the

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each of the other bound records appears an unnumbered page with the notation that the writ of certiorari was denied without opinion (R. Ca. 35-36; R. Co. 37-38; R. J. 36-37; R. L. 35-36; R. M. 36-37; R. N. 36-37; R. Sh. 35-36; R. Sm. 35-36; R. Sw. 36-37; R. W. 35-36). Submitted with the bound records in these ten cases are certified copies of the Supreme Court of Alabama's order denying certiorari.

street from the terminal of a large, hostile white crowd, petitioners' action in seating themselves at the lunch counter had been likely to provoke violence by the crowd.

Did the arrest and subsequent conviction of petitioners deprive them of rights protected by:

1. the due process clause of the Fourteenth Amendment in that they were convicted on a record barren of any evidence of guilt;

2. the due process clause of the Fourteenth Amendment in that they were convicted under penal provisions which were so indefinite and vague as to afford no ascertainable standard of criminality;

3. the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in that they were arrested and convicted to enforce racial discrimination;

4. the due process clause of the Fourteenth Amendment, as that clause incorporates the First Amendment's protection of freedom of expression, assembly and religion;

5. Title 49, United States Code, Section 316(d), which prohibits discrimination in terminal facilities of bus companies operating in interstate commerce;

6. the commerce clause of the Constitution, in that the prosecution of petitioners constituted an unlawful burden on commerce;

7. the due process clause of the Constitution in that petitioners were, in effect, entrapped, in the sense that their military guardians permitted them to sit down at a lunch counter where they had federal and constitutional rights to be served and then, without requesting petitioners to withdraw from the lunch counter, arrested them for this permitted exercise of their federal rights;

8. the supremacy clause of the Constitution in that the courts of Alabama tried and convicted petitioners pursuant to their arrest on charges which, a federal district court had already determined, were intended to perpetuate racial segregation?

Statutory and Constitutional Provisions Involved

Each of these cases involves Section 1 of the Fourteenth Amendment, Article I, Section 8 (commerce clause), and Article VI (supremacy clause) of the Constitution of the United States.

Each petitioner was convicted under Code of Alabama, Title 14, Section 407 (1958):

> If two or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall, on conviction, be punished, at the discretion of the jury, by fine or imprisonment in the county jail, or hard labor for the county, for not more than six months.

Every petitioner except Walker was also convicted under Code of Alabama, Title 14, Section 119 (1) (Supp. 1961):

> Any person who disturbs the peace of others by violent, profane, indecent, offensive or boisterous conduct or language or by conduct calculated to provoke a breach of the peace, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than five hundred dollars ($500.00) or be sentenced to hard labor for the county for not more than twelve (12) months, or both, in the discretion of the Court.

Each case also involves Title 49, United States Code, Section 316 (d):

> . . . It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever:

Statement

Petitioners, seven Negro and four white men, were arrested in the Trailways Bus Depot in Montgomery, Alabama, on May 25, 1961, while participating in a "Freedom Ride" to test racial restrictions on the use of bus terminal facilities serving interstate commerce (R. A. 172-80). The arrests occurred shortly after some of the petitioners sat together at the terminal's segregated lunch counter (R. A. 132, 180).

On the same day, May 25, 1961, a suit was filed in the United States District Court for the Middle District of Alabama seeking to enjoin the arrest of persons using interstate transportation facilities in Montgomery on a desegregated basis. Petitioner Abernathy was an original plaintiff in that action. The Attorney General of Alabama and the Circuit Solicitor for the Fifteenth Judicial Circuit (encompassing Montgomery) were defendants. Immediately after their arrests, the other ten petitioners filed a motion to intervene in the federal court action, which was granted on May 26, 1961. *Lewis* v. *Greyhound Corp.*, 199 F. Supp. 210, 213. A hearing was held in the district court on September 5, 1961. After hearing the plaintiffs' evi-

dence, including the testimony of the ranking officers who arrested these eleven petitioners, Judge Johnson dismissed the action as to the arrests of these petitioners on the ground that 28 U. S. C. §2283 "precludes the granting of such relief." Judge Johnson did, however, state:

> the court does not find or believe that the arrest [of the eleven petitioners] against whom these criminal proceedings are now pending was for any purpose other than to enforce segregation. As a matter of fact, in this posture of the case, the court is of the opinion that the arrest of those individuals was for the purpose of enforcing segregation in these facilities" (R. A: 9, 12-13; R. Ca. 8, 11; R. Co. 9, 12-13; R. J. 9, 12-13; R. L. 9, 12-13; R. M. 9, 12-13; R. N. 9, 12-13; R. Sh. 8, 11; R. Sm. 8, 11; R. Sw. 9, 12-13; R. W. 8, 12).

The eleven petitioners were tried together on September 15, 1961, in the Court of Common Pleas of Montgomery County on charges that each petitioner:

> did disturb the peace of others by violent, profane, indecent, offensive or boisterous conduct or language or conduct calculated to provoke a breach of the peace in that he did come to Montgomery, Alabama which was subject to martial rule and did unlawfully and intentionally attempt to test segregation laws and custom by seeking service at a public lunch counter with a racially mixed group, during a period when it was necessary for his own safety for him to be protected by military and police personnel and when the said lunch counter building was surrounded by a large number of hostile citizens of Montgomery.

and

> did meet with two or more persons to commit a breach of the peace or to do an unlawful act, against the peace and dignity of the State of Alabama (R. each case 1).

All eleven defendants were convicted of both breach of the peace (Ala. Code, tit. 14, §119(1) (Supp. 1961)) and unlawful assembly (Ala. Code, tit. 14, §407 (1958)). Walker was sentenced to 90 days in jail, and the others were sentenced to 15 days in jail with fines of $100 and costs (R. each case 2).

On appeal to the Circuit Court of Montgomery County, petitioners were tried again.[3] The eleven cases were consolidated for trial, but a separate judgment was entered in each case (R. A. 21; R. Ca. 20; R. Co. 21; R. J. 21; R. L. 20; R. M. 21; R. N. 21; R. Sh. 20; R. Sm. 20; R. Sw. 21; R. W. 20). Each petitioner was convicted, fined one hundred dollars and sentenced to thirty days at hard labor (R. A. 38; R. Ca. 21; R. Co. 22; R. J. 22; R. L. 21; R. M. 22; R. N. 22; R. Sh. 21; R. Sm. 21; R. Sw. 22; R. W. 21),[4] an increase in jail sentence for each petitioner except Walker.

Appeal was taken to the Court of Appeals of Alabama. Only the *Abernathy* record contained the transcript of trial in the Circuit Court, but pursuant to stipulation (R. A. 47; R. Ca. 30; R. Co. 32; R. J. 31; R. L. 30; R. M. 31; R. N. 31; R. Sh. 30; R. Sm. 30; R. Sw. 31; R. W. 30) the Court of Appeals considered the transcript a part of the record in each of the other cases (R. A. 476-77). The

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3 In the Circuit Court, where proceedings are begun by a Solicitor's complaint (Ala. Code, tit. 15, §363 (1958)), petitioner Walker was charged only with unlawful assembly (Ala. Code, tit. 14, §407 (1958)) (R. W. 3-4) and arraigned on that charge alone (R. A. 68). At the trial the Circuit Judge acknowledged that only one charge was pending against Walker (R. A. 74; see also R. A. 227, 228).

4 Default in payment of the fine will result in an additional thirty days in jail (R. A. 38; R. Ca. 21; R. Co. 22; R. J. 22; R. L. 21; R. M. 22; R. N. 22; R. Sh. 21 R. Sm. 21; R. Sw. 22; R. W. 21). Default in payment of court costs, which also were assessed, will result in an additional 133 days for petitioner Abernathy (R. A. 38-39), 80 days for the others (R. Ca. 21-22; R. Co. 22-23; R. J. 22-23; R. L. 21-22; R. M. 22-23; R. N. 22-23; R. Sh. 21-22; R. Sm. 21-22; R. Sw. 22-23; R. W. 21-22).

Court of Appeals affirmed each judgment of conviction, and rehearing was denied. The Supreme Court of Alabama denied certiorari.

In the Circuit Court the Solicitor's Complaint, which constitutes the formal charge, alleged that each petitioner (except Walker):

> did disturb the peace of others in Montgomery, Alabama, at a time when said city and county were under martial rule as a result of the outbreak of racial mob action, by conduct calculated to provoke a breach of the peace, in that he did wilfully and intentionally seek or attempt to seek service at a public lunch counter with a racially mixed group, at which time and place the building housing said lunch counter was surrounded by a large number of hostile citizens of Montgomery, Alabama, and it was necessary for his own safety for him to be protected by military and civil personnel (R. A. 3-4; R. Ca. 3; R. Co. 3; R. J. 3; R. L. 3; R. M. 3; R. N. 3; R. Sh. 3; R. Sm. 3; R. Sw. 3)

and that each petitioner:

> did meet with two or more persons to commit a breach of the peace or to do an unlawful act, in that he did meet with two or more persons in Montgomery, Alabama, at a time when said city and county were under martial rule as a result of the outbreak of racial mob action, for the purpose of wilfully and intentionally seeking or attempting to seek service at a public lunch counter with a racially mixed group at which time and place the building housing said lunch counter was surrounded by a large number of hostile citizens of Montgomery, Alabama, and it was necessary for his own safety for him to be protected by military and police personnel, against the peace and dignity of the State

of Alabama (R. A. 4; R. Ca. 3; R. Co. 3; R. J. 3; R. L. 3; R. M. 3; R. N. 3; R. Sh. 3; R. Sm. 3; R. Sw. 3; R. W. 3-4).

The petitioners are four ministers (Coffin, Abernathy, Walker and Shuttlesworth), three professors of religion (Maguire, Noyce and Swift), three theology students (Carter, Jones and Lee), and a law student (Smith) (R. A. 172-178). Coffin, Maguire, Smith, Noyce and Swift traveled from Connecticut to Atlanta, Georgia, where they were joined by Carter and Jones, who had begun in North Carolina (R. A. 176). On Wednesday, May 24, 1961, the seven set off from Atlanta on a bus trip across the South to determine the extent of segregation in interstate bus terminal facilities and to protest against segregation (R. A. 117, 175, 176). They arrived at the Greyhound terminal in Montgomery late Wednesday afternoon and stayed the night (R. A. 176).

Martial law had been declared in Montgomery on the previous Sunday, May 21, 1961 (R. A. 127-28). At the request of Gen. Henry Graham, Commander of the Alabama National Guard detachment in Montgomery (R. A. 135), the petitioners notified the military authorities of their intention to depart from Montgomery on Thursday morning, and a number of military vehicles were sent to Rev. Abernathy's home, where the petitioners were gathered. A heavily armed military convoy escorted the seven interstate passengers along with Abernathy, Walker, Shuttlesworth, and Lee to the rear of the Trailways terminal (R. A. 83, 129-31, 178, 218). Across the street from the front of the terminal was a crowd of three to five hundred persons (R. A. 77, 122, 131) under the control of more than one hundred National Guardsmen and several civilian law enforcement officers (R. A. 121-23, 219).

Still under military escort, petitioners entered the white waiting room from the rear of the segregated terminal (R. A. 106-07, 123, 132, 180). In the terminal at the time were thirty to fifty persons including the eleven petitioners and twelve to twenty-five Guardsmen and local officers (R. A. 77, 111, 121, 132, 220). After the seven travelers bought tickets to Jackson, Mississippi (R. A. 132, 180), all of the petitioners except Walker, who was making a telephone call (R. A. 123-24), proceeded toward the lunch counter, where some of them sat down on the available seats and ordered coffee (R. A. 132, 133, 180). They were served by the counter man (R. A. 184) after the waitress had moved aside (R. A. 133), but within a very short time Sheriff M. S. Butler arrested all eleven men pursuant to a signal given by Col. Poarch, Staff Judge Advocate of the National Guard (R. A. 76, 84, 89, 127).

It is uncontested that petitioners conducted themselves in an orderly fashion. They were continuously respectful toward the authorities who had escorted them to the terminal and accompanied them inside (R. A. 98, 124, 141, 185). Having been taken into the white waiting room by these authorities, they were unmolested while the travelers bought tickets and Walker used the telephone. They were not told to refrain from buying a cup of coffee, and when they sat down, they were neither requested nor ordered to leave (R. A. 96, 139-40, 186, 211). They were abruptly arrested by the authorities who had brought them to the depot.

While the petitioners were in the terminal, but before they moved toward the lunch counter, two or three white men were ejected from the terminal for pouring coffee on the counter seats. Although Col. Poarch viewed the conduct of these "white toughs" as calculated to provoke a breach of the peace, they were not arrested (R. A. 84, 91, 102, 133, 139, 146).

Sheriff Butler, the officer who arrested petitioners, testified that he heard an "outburst" from the crowd outside when the petitioners sat down at the counter, and that petitioners' conduct could have caused a riot (R. A. 98, 102-03).[5] Col. Poarch stated that the crowd outside was very tense and hostile toward petitioners (R. A. 131); that the "air was electric with excitement and tension" (R. A. 134); that tension inside the terminal increased because the waitresses left the counter area when the petitioners approached (R. A. 133). Col. Poarch said that he had no time to assess the attitudes or actions of the crowd outside (R. A. 146), but he ordered the arrests when petitioners sought service because "you can't yell 'Fire' in a crowded theater" (R. A. 141). "They were arrested because of the danger of provoking a riot causing injury to themselves and to all other persons involved including the National Guardsmen" (R. A. 149). Gen. Graham testified that violation of the custom of segregation at that time could have inflamed the crowd outside (R. A. 211, 220-221). Floyd Mann, Director of Public Safety, thought that petitioners' conduct was calculated to cause disorder in the bus station (R. A. 120).

The size of the crowd outside the terminal was variously estimated at three hundred, several hundred, and four to five hundred (R. A. 131, 122, 77). Uncontradicted testimony establishes that at least one hundred troops were lined up across the street between the crowd and the terminal (R. A. 100, 121-23, 178, 219). Traffic on the street in front of the terminal was blocked off (R. A. 131). Motorcycle policemen were patrolling it, and thirty-five men from the Department of Public Safety were on

5 The state presented testimony that the inside of the terminal was visible through the front windows to the crowd across the street from the terminal (R. A. 103). This was disputed (R. A. 183-84).

hand (R. A. 121-22). Throughout the record there is no reference to any overt action or threat on the part of any person or group outside the station. One prosecution witness testified that no one in the crowd was arrested (R. A. 122).

A considerable amount of testimony was admitted with respect to events of the week previous to these arrests. It was established that a group of Freedom Riders arriving in Montgomery on Saturday, May 20, 1961 were greeted by an angry crowd (R. A. 80). Fighting broke out between whites and Negroes and between local persons and visiting newsmen. Several were hurt, including some of the Riders (R. A. 113-114, 225). An hour after the crowd was dispersed, fighting broke out again (R. A. 114). On the following day, Sunday, May 21, an angry crowd, predominantly white, gathered outside Rev. Abernathy's Negro church where an evening meeting was being conducted (R. A. 81, 82, 114-15, 118). Bricks and rocks were thrown, and a car was found burning when the police arrived (R. A. 81, 115).

Following the Sunday riot, martial law was declared by the Governor (R. A. 128). Fourteen hundred National Guardsmen, armed and equipped, were brought in; the City was patrolled by armed convoys, and sentry posts were set up (R. A. 128). Mr. Mann testified that "racial unrest" continued through the week (R. A. 125). A moving line of cars encircled the Greyhound station on Monday when a group of Freedom Riders was expected, and National Guard reinforcements "encountered some difficulty in clearing the situation up," but the Riders did not appear (R. A. 128). A Negro minister was shot at an unspecified time during the week, but the suspected perpetrators were arrested the following day (R. A. 117, 129). Crowds gathered at various times at

air, bus, and train terminals (R. A. 129). On Wednesday the National Guard escorted two groups of Freedom Riders from Montgomery to the Mississippi line (R. A. 119, 142-143, 206). Col. Poarch testified that the populace and authorities thought the crisis was over on Wednesday when the second group was safely escorted to Mississippi, only to have the seven out-of-state petitioners arrive in Montgomery (R. A. 142-144). Col. Poarch said he had heard that these petitioners had been met by "hostile crowds of some two thousand who stoned the car in which they were riding" from the station (R. A. 143). Another prosecution witness, an observer on the scene, stated that they were greeted by a crowd of 150 to 200, that there were no demonstrations at the time, and no bricks or other objects were thrown (R. A. 154).

Undisputed testimony established that one group of Freedom Riders departing from the Trailways Bus Depot on Wednesday had used the lunch counter on an integrated basis and had remained in the terminal for thirty to forty-five minutes. They were not arrested and no incident occurred although 250 to 350 people were crowded around the terminal (R. A. 223), approximately the same number as on Thursday when petitioners were arrested (R. A. 122). Sheriff Butler, Col. Poarch and Gen. Graham were aware on Thursday that the Trailways lunch counter had been integrated without incident on the previous day (R. A. 95, 135, 206). Petitioner Coffin stated that the petitioners also knew of this when they proceeded to the counter on Thursday (R. A. 177).

The Trailways Bus Depot in Montgomery is "in the business of providing accommodations for interstate passengers" (R. A. 165). It is used by three bus companies engaged in interstate commerce (R. A. 165) and its "facilities are an integral part of interstate commerce" (R. A.

167). The lunch counter portion of the terminal is leased by the three carriers to a corporation which in turn leases it to another corporation which operates the counter under the supervision of an employee of one of the interstate carriers (R. A. 49).[6]

How the Federal Questions Were Raised and Decided Below

In the Circuit Court, petitioners filed identical motions to quash the complaint. Invoking the provisions of the Fourteenth Amendment, petitioners alleged deprivation of freedom of expression, freedom of religion, freedom of movement, and freedom of association; denial of due process arising from prosecution on vague charges; and denial of equal protection of the laws. The motions to quash also claimed that petitioners were arrested in order to enforce segregation in facilities serving interstate commerce, in violation of Title 49, United States Code, Section 316(d) and the commerce clause (Article I, Section 8) of the Constitution as well as the due process and equal protection clauses of the Fourteenth Amendment (R. A. 6-8; R. Ca. 5-7; R. Co. 6-8; R. J. 6-8; R. L. 5-8; R. M. 6-8; R. N. 6-8; R. Sh. 5-7; R. Sm. 5-7; R. Sw. 6-8; R. W. 5-8). The motions were overruled (R. A. 21; R. Ca. 20; R. Co. 21; R. J. 21; R. L. 20; R. M. 21; R. N. 21; R. Sh. 20; R. Sm. 20; R. Sw. 21; R. W. 20).

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6 The parties stipulated (R. A. 47, 49) that:

> ... The lunch counter portion of the terminal is leased by the aforesaid carriers to the Interstate Co., a Delaware Corporation, which in turn leases the lunch counter portion of the terminal to Southern House, Inc., which operates the lunch counter portion of the terminal subject to the supervision with respect to the manner of serving white and negro patrons of R. E. McRae.

Petitioners also demurred to the complaint, again raising all of the objections made in the motions to quash. The demurrers alleged, in addition, that each statute under which petitioners were charged was vague, indefinite and uncertain, and as such was unconstitutional on its face and as interpreted and applied (R. A. 14-20; R. Ca. 13-19; R. Co. 13-20; R. J. 14-20; R. L. 13-19; R. M. 14-20; R. N. 14-20; R. Sh. 13-19; R. Sm. 13-19; R. Sw. 14-20; R. W. 13-19). The demurrers were overruled (R. A. 21; R. Ca. 20; R. Co. 21; R. J. 21; R. L. 20; R. M. 21; R. N. 21; R. Sh. 20; R. Sm. 20; R. Sw. 21; R. W. 20).

After presentation of the state's case (R. A. 161), a motion was made on behalf of each petitioner (R. A. 47, 48) to exclude the state's evidence (R. A. 22). This motion made again all objections raised in the motions to quash and demurrers, and in addition alleged a denial of federal due process because the record was devoid of proof of each element of the offenses charged (R. A. 22-27). Attached to the motion to exclude was a copy of the transcript (R. A. 229-472), opinion (R. A. 27-36), and decree (R. A. 36-37) in the case of *John R. Lewis, et al.* v. *Greyhound Corp., et al.*, 199 F. Supp. 210 (M. D. Ala. Nov. 1, 1961), in which the federal court enjoined further arrests such as those of the petitioners and found that the petitioners' arrests were designed to enforce segregation. The Circuit Judge granted the State's motion to strike the exhibits and overruled the petitioners' motion to exclude the evidence (R. A. 163-64). The motion to exclude was presented again at the conclusion of the case, and denied (R. A. 227).

Following the judgment and sentence in the Circuit Court, identical motions for new trial were filed, renewing all objections raised in previous motions (R. A. 40-44; R. Ca. 23-27; R. Co. 24-29; R. J. 24-28; R. L. 23-27; R.

M. 24-28; R. N. 24-28; R. Sh. 23-27; R. Sm. 23-27; R. Sw. 24-28; R. W. 23-27). The motions for new trial were overruled (R. A. 46; R. Ca. 29; R. Co. 31; R. J. 30; R. L. 29; R. M. 30; R. N. 30; R. Sh. 29; R. Sm. 29; R. Sw. 30; R. W. 29).

The Court of Appeals of Alabama, in an opinion delivered in the *Abernathy* case, expressly decided several issues adversely to the petitioners, holding:

> that the statutes creating the offenses of unlawful assembly, Sec. 407, Title 14, and breach of the peace, Sec. 119(1), Title 14, Code, supra, do not, either in themselves or as construed and applied to this defendant, abridge the right of free speech and assembly guaranteed by the First Amendment to the Constitution of the United States, nor has he been denied the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States . . . (R. A. 485; appendix, *infra*, p. 10a).

Every issue was met by the Court of Appeals' declaration that "The motion to quash [,] the demurrer, and the motion to exclude the evidence were properly overruled" (R. A. 485; appendix, *infra*, p. 10a).

The Court of Appeals accepted the following definition of unlawful assembly:

> an assembly of [two] or more persons, who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so assembled would commit a breach of the peace or provoke others to do so. 2 *Wharton's Criminal Law*, Sec. 853,

p. 721; *Shields* v. *State*, 184 Wis. 448, 204 N. W. 486, 40 A. L. R. 945; *Aron* v. *Wasau*, 98 Wis. 592, 74 N. W. 354 (R. A. 485-86; appendix, pp. 10a-11a).

and this definition of breach of the peace:

> In general terms a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence or tending to provoke or excite others to break the peace. *Shields* v. *State*, *supra*. 8 [Am.] Jur. Sec. 3, p. 834 (R. A. 486; appendix, *infra*, p. 11a).

It held that:

> No specific intent to breach the peace is essential to a conviction for a breach of the peace. *State* v. *Cantwell*, 126 Conn. 1, 8 A. 2d 533; *Cantwell* v. *Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. ed. 1213; 128 A. L. R. 1352. Nor is it necessary to constitute the offense of a breach of the peace that the proof show the peace has actually been broken. *People* v. *Kovalchuck*, 68 N. Y. S. 2d 165; *People* v. *Ripke*, 115 N. Y. S. 2d 590 (R. A. 486; appendix, *infra*, p. 11a).

Asserting that the lawfulness of an act may be determined by the circumstances surrounding it, the Court of Appeals concluded that "it could not conceivably be said that [petitioner] did not have knowledge that his conduct was calculated to incite a breach of the peace . . . Under the facts and circumstances adduced we think the question of whether the defendant's conduct was reasonably calculated to provoke a breach of the peace was one for the trier of fact" (R. A. 487; appendix, *infra*, p. 12a).

In each of the other cases, the Court of Appeals rendered no opinion but affirmed the convictions on the authority of

the *Abernathy* case (R. Ca. 34; R. Co. 36; R. J. 35; R. L. 34; R. M. 35; R. N. 35; R. Sh. 34; R. Sm. 34; R. Sw. 35; R. W. 34). In all eleven cases, the Supreme Court of Alabama denied certiorari without opinion (R. A. 496).

Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

I

The Decision Below Affirms Criminal Convictions Based on No Evidence of Guilt.

A. *Breach of the Peace*

Petitioners were convicted because, as the Solicitor's Complaint alleges, they "did wilfully and intentionally seek or attempt to seek service at a public lunch counter with a racially mixed group." It is not disputed that petitioners had every right to be in the bus terminal and to use the lunch counter on a desegregated basis. See 49 U. S. C. §316(d); *Boynton* v. *Virginia*, 364 U. S. 454; *Gayle* v. *Browder*, 352 U. S. 903; *Morgan* v. *Virginia*, 328 U. S. 373.[7] Nor is there the slightest indication that any of the petitioners lost that right by engaging in conduct or language that could be characterized as violent, profane, indecent, offensive or boisterous.

Nonetheless, it is the state's theory that petitioners abused their rights by exercising them in the presence of

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7 Following these arrests, in September, 1961, the Interstate Commerce Commission issued regulations barring racial segregation in all bus terminal facilities serving interstate commerce. 49 C. F. R. §180(a)(1)-(10).

hostile observers who presented a threat of violence. Even this outlandish theory is unsupported by the record. The evidence of threatened violence consists merely of testimony that a crowd was outside, that violence had occurred within the previous week, that the air was electric with excitement, that a few white toughs had poured coffee on the counter seats, that an "outburst" was heard when petitioners sat down, and that military and civilian authorities believed that arrests were necessary to preserve the peace.

No one testified as to the behavior of the crowd. Not a single incident of violence or unruly conduct was cited. There is no evidence that any person in the crowd even said anything critical of the petitioners or toward incitement of others in the crowd. Moreover, there was solid, undisputed evidence that over one hundred armed National Guardsmen were present on the scene, that they were well deployed to control the situation, and that order had been maintained since the military authorities had assumed control. It was also shown conclusively that under very similar circumstances this lunch counter had been desegregated without incident on the day before, and that the petitioners were not even asked by the authorities to refrain from using the lunch counter.

Conviction on such a record violates due process of law under the rule of *Thompson* v. *Louisville*, 362 U. S. 199. The testimony was too speculative and remote to constitute any evidence of a probable disturbance that could not be handled with ease by the authorities on the scene. As in *Garner* v. *Louisiana*, 368 U. S. 157, and *Taylor* v. *Louisiana*, 370 U. S. 154, the evidence established merely that petitioners were peacefully exercising their lawful rights in violation of a local custom of segregation. In the *Taylor* case there was evidence that onlookers became restless and some

climbed on chairs, but that could not ground a conviction for breach of the peace.

Assuming, however, that the state had amply proved its contention that petitioners were playing with dynamite by ordering a cup of coffee, these convictions still could not stand. The issue of threatened violence by those who oppose the constitutional rights of others is not properly in the case. As this Court said last term in *Wright* v. *Georgia*, 373 U. S. 284, 293, "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present." [Citing *Taylor* v. *Louisiana, supra, Garner* v. *Louisiana, supra,* and *Buchanan* v. *Warley,* 245 U. S. 60]. Numerous other decisions of this Court and others squarely establish the principle that the wrongful conduct of one person or group cannot be used as a pretext for denying the constitutional rights of others. *Cooper* v. *Aaron,* 358 U. S. 1, *affirming,* 257 F. 2d 33, 38-39 (8th Cir. 1958); *Watson* v. *City of Memphis,* 373 U. S. 526. As Judge Brown of the Fifth Circuit wrote recently,

> . . . liberty is at an end if a police officer may without warrant arrest, not the persons threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and legally and constitutionally protected, is deemed offensive and provocative to settled social customs and practices. When that day comes . . . the exercise of [First Amendment freedoms] must then conform to what the conscientious policeman regards the community's threshold of intolerance to be. *Nesmith* v. *Alford,* 318 F. 2d 110, 121 (1963).

Without basing petitioners' guilt on the threat of wrongful action by others, the state has no case at all. Its evi-

dence shows only that petitioners peacefully sought service at a lunch counter, and this falls far short of establishing a breach of the peace.

The relevant portion of Alabama's statute condemns "any person who disturbs the peace of others . . . by conduct calculated to provoke a breach of the peace." Previous constructions of the statute shed no light on its meaning.[8] A normal interpretation would limit its applicability to situations in which 1) the peace of others was actually disturbed, and 2) the action of the accused was in some way offensive or wrongful, even if not calculated or intended to create a disturbance. Even the broad interpretations often given to the term breach of the peace, *e.g. Cantwell* v. *Connecticut*, 310 U. S. 296, *Edwards* v. *South Carolina*, 372 U. S. 229, do not eliminate the necessity of some type of wrongful, offensive or incitatory conduct.

Unless injury to the delicate sensibilities of those who oppose integration can be considered an actual disturbance of the peace, this record lacks any evidence of this essential element of the offense, and the rule of *Thompson* v. *Louisville* clearly applies. Likewise, there is no evidence of any wrongful conduct by petitioners. Here, as in *Wright* v. *Georgia*, 373 U. S. 284, 285, "The record is devoid of evidence of any activity which a breach of the peace statute might be thought to punish."

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8 The only Alabama case approaching a construction of the 1959 statute (Tit. 14, §119(1)) is *Mitchell* v. *State*, 130 So. 2d 198 (Ala. App. 1961), *cert. denied*, 130 So. 2d 204 (Ala. Sup. Ct.). In that case a conviction was reversed because the complaint, which alleged merely that the defendant engaged in "conduct calculated to provoke a breach of the peace", was held to be too vague. It was further declared that the evidence, showing only that the defendant walked in front of complainants with his hands in his pockets and acted "strutty", was insufficient to make out an offense, even if well pleaded.

Thus, whether or not the "evidence" of threatened violence is considered, this case is governed by *Thompson* v. *Louisville, supra, Garner* v. *Louisiana, supra,* and *Taylor* v. *Louisiana, supra.*

B. *Unlawful Assembly*

Title 14, Section 407 makes it a crime when "two or more persons meet together to commit a breach of the peace, or to do any other unlawful act. . . ." Clearly, there is no evidence in this record of a breach of the peace as that term is normally understood. Nor is there any evidence whatever of the commission of any other unlawful act. Thus, the applicability of *Thompson* v. *Louisville, supra,* seems undeniable.

Conceivably, the state could reason that, notwithstanding any normal or reasonable interpretation of "breach of the peace", petitioners' convictions under the breach of the peace statute conclusively establish that they committed a breach of the peace while assembled. This, of course, would give rise to the objection that the unlawful assembly statute is unconstitutionally vague (see Section II, *infra*).[9] Regardless of that, the argument in Section I-A above demonstrates that there was no evidence of breach of the peace, no matter how broadly the breach of the peace statute is construed.

The convictions under both the breach of the peace and the unlawful assembly laws share an additional infirmity which is related to the no evidence claim—e.g. that the petitioners' conduct, which is here attempted to be made criminal, was induced by state officers. The action of the military officials in escorting petitioners to the bus terminal and

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9 Furthermore, as to petitioner Walker, he was not even charged with breach of the peace.

then arresting them for being there and using the public facilities was comparable to an entrapment. By escorting petitioners, permitting them access to the "white" waiting room, and not warning them they should not use the lunch room or behave in any particular way, the military authorities impliedly asserted that they had the situation in hand and that petitioners could exercise their rights without any restriction imposed because of the presence of a crowd outside the terminal. Thus petitioners' alleged "crime" was the product of the "creative activity" of state officers in leading the petitioners to believe that they could freely use the terminal facilities. *Cf. Sherman* v. *United States,* 356 U. S. 369, 372. It "offends a sense of justice," *cf. Rochin* v. *California,* 342 U. S. 165, 173, that state officers should be permitted to induce an act to be done and then punish it as criminal. Whether the criminal law rule as to entrapment need be made a due process matter generally is not necessary to decide. It is sufficient that here the state-induced activity is conceded to be an activity that is generally lawful. The only claim of illegality results from the alleged special circumstances pertaining to the crowd outside the terminal, which were known to the state authorities when they escorted petitioners to the terminal and did not warn them that any such extraordinary limitations would be placed upon their actions.

II

The State Statutes, as Construed and Applied to Convict Petitioners, Are So Vague, Indefinite and Uncertain as to Offend the Due Process Clause of the Fourteenth Amendment.

A. *Breach of the Peace*

Conviction of petitioners under the provisions of a statute outlawing "conduct calculated to provoke a breach of the peace" is blatantly unfair. As construed and applied to petitioners, this vague statute violated due process of law.

It has been established that petitioners, under the protection of state authorities, peacefully entered a bus terminal, bought tickets to an out-of-state destination and ordered coffee at the lunch counter. They had every reason to believe that their actions would be protected (R. A. 186, 211). They were not refused service (R. A. 184). They were not asked to move away from the counter, nor were they warned that their actions were considered dangerous (R. A. 96, 139-140, 186, 211). Others had done precisely the same thing on the day before without being arrested (R. A. 95, 135, 206, 223).

Under these circumstances, they were arrested under a broad, general, and vague statute. The Court of Appeals construed the statute to mean that no actual disturbance of the peace was necessary; that no specific intent to breach the peace was necessary; that violent, profane, indecent, offensive, or boisterous conduct was immaterial (R. A. 486; appendix, *infra*, p. 11a).

The court's holding means that whenever a person or group performs an innocent and lawful act in the presence of others who might object to the doing of that act, they can

be convicted under this statute. It means that the exercise of constitutional rights in Alabama is subject to the irrational and unlawful actions of others and to the unbridled discretion of the arresting officer to determine whether potential lawbreakers present a threat of disorder which justifies suppression of inherently innocent conduct.

Surely the statute never warned petitioners that such was the case. No previous construction of Alabama courts gave the statute such a broad interpretation.[10] In this case the Court of Appeals relied completely on out-of-state authorities for its construction of the statute (R. A. 486; appendix, *infra*, p. 11a). Moreover, it misconstrued those authorities by accepting the proposition that completely innocent acts are punishable as breaches of the peace when such was never intended to be the law despite broad definitions of breach of the peace.[11]

It is clear that a hypothetical precise law providing "it shall be unlawful for any person or group to violate accepted customs of racial segregation at bus terminal lunch counters when in the opinion of law enforcement officers on the scene such violation would tend to excite unruly crowds in the vicinity" could not (because of the equal protection clause) reach petitioners' conduct. *Cf. Cooper* v. *Aaron*, 358 U. S. 1. But even if this proposition were doubtful, it is manifest that a vague statute cannot provide the basis for such a criminal prosecution. *Wright* v. *Georgia*, 373 U. S. 284; *Edwards* v. *South Carolina*, 372 U. S. 229; *Garner* v. *Louisiana*, 368 U. S. 157, 198 (concurring opinion); *Cantwell* v. *Connecticut*, 310 U. S. 296.

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10 See note 6, *supra*.

11 Citing 8 Am. Jur., Breach of the Peace, §3, p. 834, the Court of Appeals quoted broad language, but omitted to mention that in the same paragraph that authority assumes that actionable conduct must be "unjustifiable or unlawful" or "wicked."

This Court has often held that criminal laws must define crimes sought to be punished with sufficient particularity to give fair notice as to what acts are forbidden. As was held in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what crimes are forbidden." See also, *United States* v. *L. Cohen Grocery*, 255 U. S. 81, 89; *Connally* v. *General Const. Co.*, 269 U. S. 385; *Raley* v. *Ohio*, 360 U. S. 423. The statutory provision applied to convict petitioners in this case is so vague that it offends the basic notions of fair play in the administration of criminal justice that are embodied in the due process clause of the Fourteenth Amendment.

Moreover, the statute punished petitioners' protest against racial segregation practices and customs in the community; for this reason the vagueness is even more invidious. When freedom of expression is involved the principle that penal laws may not be vague must, if anything, be enforced even more stringently. *Cantwell* v. *Connecticut*, 310 U. S. 296, 308-311; *Scull* v. *Virginia*, 359 U. S. 344; *Watkins* v. *United States*, 354 U. S. 178; *Herndon* v. *Lowry*, 301 U. S. 242, 261-264.

B. *Unlawful Assembly*

The same reasoning and authorities apply to the convictions for unlawful assembly. Title 14, Section 407 is hopelessly vague, condemning as it does not only a meeting of two or more persons "to commit a breach of the peace", but also a meeting to do "any other unlawful act."

"Breach of the peace" normally refers to some type of boisterous, violent or otherwise blameworthy conduct; but there was no evidence of any such actions by petitioners. No prior construction of this law by the Alabama courts

warned that the law applied to purely innocent activity which might provoke others to unlawful acts of opposition, and surely the text of the law gives no hint that it is subject to such a construction. Thus, the law fails to provide any standard of criminality to guide a judge or jury in applying it, and is patently subject to capricious enforcement.

The second clause of the law punishing a meeting "to commit any other unlawful act" might have almost limitless applicability. But except for the breach of peace charges, the record in this case indicates no contention by the state that petitioners' action was unlawful. It is evident that this clause, like the others discussed above, fails to provide any warning that a legally and constitutionally protected activity—sitting in an integrated group at a bus station lunch counter formerly reserved for whites only—can be punished as unlawful.

Moreover, as petitioners were charged under the alternative words of the statute, to this day, they cannot know whether the state claims that they met to commit a breach of the peace or met to commit some other unlawful act. If either of the statutory clauses is unconstitutionally vague, the conviction under this law must be reversed for it cannot be known which part was relied upon by the trial or appellate courts, *Stromberg* v. *California,* 283 U. S. 359; *Thomas* v. *Collins,* 323 U. S. 516; *Williams* v. *North Carolina,* 317 U. S. 387.

III

The Arrests and Convictions of Petitioners on Charges of Breach of the Peace and Unlawful Assembly Constitute Enforcement by the State of the Practice of Racial Segregation in Bus Terminal Facilities Serving Interstate Commerce, in Violation of the Equal Protection Clause of the Fourteenth Amendment, the Commerce Clause of the Constitution, and 49 U. S. C. §316(d).

This is an uncomplicated case of state enforcement of segregation. Unlike several trespass cases brought before this Court, there is no problem of private property rights or private judgment, for the lunch counter operator here was under a statutory duty to serve petitioners, *Boynton* v. *Virginia*, 364 U. S. 454, and he acknowledged that duty by serving them (R. A. 184). The arrests were ordered and executed by agents of the state who made no pretense of responding to private choice.

Petitioners contend that no amount of evidence could justify the state's action on the ground that innocent and protected conduct could lead to violence by others (see Section I, *supra*). However, that issue need not be faced, because petitioners were arrested for the purpose of enforcing segregation in the terminal facilities. Judge Johnson so found in *Lewis* v. *Greyhound Corp.*, 199 F. Supp. 210 (M. D. Ala. 1961), *supra* p. 7, and the record here is clear.

A large force of military and civilian law enforcement officers was posted both inside and outside the terminal (R. A. 77, 111, 121-23, 132). The crowd outside was under control (R. A. 121-23), and the persons who poured coffee on the counter seats were swiftly apprehended (R. A. 133). Col. Poarch testified that dispersing the crowd was not considered (R. A. 135). It had been allowed to form al-

though petitioners gave the military command advance notice of their departure plans (R. A. 129). Gen. Graham admitted his anger at the actions of petitioners (R. A. 208), which could well explain his failure to warn them of the peril they supposedly created by sitting down. No effort was made to offer petitioners protection if they would leave the terminal and delay their trip until a quieter time.

The authorities of the State of Alabama chose none of these alternatives, but summarily arrested the racially integrated group that was violating its customs. This, of course, was in direct contrast to the failure to arrest the persons who poured coffee on the seats.

When a state enforces the practice of racial segregation in facilities serving interstate commerce by its administration of the criminal law, it denies equal protection of the laws. *Bailey* v. *Patterson*, 369 U. S. 41; *Turner* v. *Memphis*, 369 U. S. 350; *Gayle* v. *Browder*, 352 U. S. 903, affirming, 142 F. Supp. 707 (M. D. Ala. 1956); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960); cf. *Shelley* v. *Kraemer*, 334 U. S. 1; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

This use of the state's machinery also conflicts with the statute forbidding discrimination in facilities operated by interstate motor carriers, 49 U. S. C. §316(d); *Boynton* v. *Virginia*, 364 U. S. 454, and constitutes an unlawful burden on commerce in violation of Article I, Section 8 of the Constitution, *Morgan* v. *Virginia*, 328 U. S. 373.

The reasoning in this Section is equally applicable to the convictions for breach of the peace and for unlawful assembly.

IV.

The Decision Below Conflicts With Decisions of This Court Securing the Fourteenth Amendment Right to Freedom of Expression, Assembly and Religion.

By taking seats at the lunch counter in the Trailways Bus Depot, petitioners were exercising not only their right to use interstate transportation facilities unfettered by racial restrictions, but also the rights guaranteed by the First Amendment. Freedom of expression is not limited to verbal utterances. It covers picketing, *Thornhill* v. *Alabama*, 310 U. S. 88; free distribution of handbills, *Martin* v. *Struthers*, 319 U. S. 141; display of motion pictures, *Burstyn* v. *Wilson*, 343 U. S. 495; joining of associations, *NAACP* v. *Alabama*, 357 U. S. 449; the display of a flag or symbol, *Stromberg* v. *California*, 283 U. S. 359. More in point, Justice Harlan recognized that sitting in at a segregated lunch counter in a southern state is a non-verbal form of expression protected by the Fourteenth Amendment. *Garner* v. *Louisiana*, 368 U. S. 157, 185 (concurring opinion). Several of the petitioners were ministers, professors of religion and students of theology, and all considered racial segregation as contrary to their religious beliefs.

Because the petitioners' right to be in the terminal and to use the lunch counter is unquestioned, no issue is presented as to the propriety of engaging in public expression in a place where one is not invited. *Garner* v. *Louisiana*, 368 U. S. 157, 185 (concurring opinion).

Petitioners had the right to express their views unless their conduct was "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or arrest." *Terminiello* v. *Chicago*, 337 U. S. 1, 4. "A state may not unduly suppress

free communication of views, religious or other, in the guise of conserving desirable conditions," *Cantwell* v. *Connecticut*, 310 U. S. 296, 308.

In the *Cantwell* case, where the defendant was expressing unpopular views that angered his listeners to the point of specific threats of violence, this Court reversed the conviction for common law breach of the peace. Justice Roberts wrote, "We have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." *Id.* at 308. Therefore, ". . . in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioners' communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." *Id.* at 311. See also, *Garner* v. *Louisiana*, 368 U. S. 157, 185, 199-204 (Harlan, *J.*, concurring).

In *Edwards* v. *South Carolina, supra*, a large crowd had gathered to observe the marching of almost two hundred Negro students protesting to the Legislature against racial discrimination and segregation. The Court, through Justice Stewart, relied heavily on the fact that "there was no evidence to suggest that onlookers were anything but courteous and no evidence at all of any threatening remarks, hostile gestures or offensive language on the part of any member of the crowd." 372 U. S. at 231. This record, of course, is identical in these respects.

With respect to the actions of the demonstrators, in *Edwards* a huge group of demonstrators were present.

They sang and chanted after refusing to disperse upon command by the city officials who had allowed them to demonstrate unmolested for forty-five minutes. Here, petitioners merely sat down at a lunch counter. The Court's reasoning in *Edwards* is applicable here:

> "We did not review in this case criminal convictions resulting from the even-handed application of a precise and finely drawn regulatory statute defining a legislative judgment that certain specific conduct be limited or proscribed. . . . These petitioners were convicted of an offense so generalized as to be . . . 'not susceptible of an exact definition.' And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." 372 U. S. at 236-37.

This case is not to be compared with *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, where the speaker used fighting words, nor *Feiner* v. *New York,* 340 U. S. 315, where the evidence showed that the crowd was pushing, shoving, and milling around and that the speaker passed the bounds of argument or persuasion. This is a clear case of state interference with First Amendment freedoms in violation of the Fourteenth Amendment. *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357; *Stromberg* v. *California,* 283 U. S. 359.

The reasoning in this Section is equally applicable to the convictions for breach of the peace and for unlawful assembly.

V

The Courts Below Deprived Petitioners of Due Process and Violated the Supremacy Clause by Refusing to Accept the Federal District Court Finding That Petitioners Were Arrested to Enforce Racial Segregation.

The trial court erroneously excluded appellants' exhibit which contained the findings in the *Lewis* case that the arrests of appellants were solely to enforce segregation (R. A. 9, 12-13). If this character of the arrests were established in this case it would be a complete defense to the state's charges of disorderly conduct and unlawful assembly, *Boynton* v. *Virginia, supra.*

The federal district court rendered a determination that petitioners, in the exact circumstances which form the basis of the state's prosecution, were in the exercise of a federal right granted by statute, and that the arrests by the state were unconstitutionally designed to enforce segregation. To refuse to give conclusive effect to the declaration of federal rights both statutory and constitutional by a competent federal court is to nullify those rights in violation of the supremacy clause (Article VI) of the United States Constitution.

This state court action violates the due process clause of the Fourteenth Amendment. The Restatement of Judgments, Section 68(1) states, with regard to collateral estoppel, that ". . . where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." The rule has been applied in criminal cases, *United States* v. *Oppenheimer,* 242 U. S. 85; *Sealfon* v. *United States,* 332 U. S. 575, and was designed to elimi-

nate harassment of defendants and the inconsistent results of duplicatory litigation as in this case. The "doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character." *Yates* v. *United States,* 354 U. S. 298, 335. For the court below to decline to apply a doctrine grounded in consideration of basic fairness, deprives the appellants of due process of law.

Wolfe v. *North Carolina,* 364 U. S. 177, presented a situation paralleling that here. In that case, however, the court did not reach the constitutional issue because the petitioners had failed to present the issue to the state court on appeal. Petitioners here have made the necessary proffer of the federal proceedings and duly excepted to their being struck from the evidence (R. A. 161-164). *Hoag* v. *New Jersey,* 356 U. S. 464, is also no bar to appellants' claim of denial of due process of law, for there the issues and parties were not the same. Hoag and other defendants were acquitted in their first trial of robbing three persons in a tavern. It was held valid to try them a second time on a charge of having robbed a fourth person, present in the tavern, who had not been named in the first indictment. In the instant case there was substantial identity of parties. The criminal case was prosecuted in the name of the state by the Circuit Solicitor who was a defendant in the federal court case along with the State Attorney General. The issue of whether the arrests were designed to enforce segregation is common to both proceedings.

CONCLUSION

Review by this Court is particularly appropriate in a case such as this where a federal court has once deferred to the state courts despite a clear finding that the arrests were to enforce segregation. This it is submitted is a compelling case for review, not only because the error below is so manifest, but also because the entire federal system is jeopardized if a state can successfully defeat the plain rights of citizens under the Constitution by such a gross distortion of its criminal laws.

It is respectfully submitted that the petition should be granted.

Respectfully submitted,

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